

[Waiver 1992-6]
W-92-35

September 9, 1992

Myron Preactor
[Address withheld]

Re: Request for Waiver

Dear Mr. Preactor:

The Ethics Commission has reviewed your request dated June 24, 1992, for a waiver under the Montgomery County Public Ethics Law.

Based on your written request, an interview with you and Jerome I. Baylin, Director, Department of Liquor Control on July 1, 1992, and the Request for Proposals No. 27734 reviewed by Ethics Commission staff, the Ethics Commission understands your request and the facts as follows:

The County issued RFP No. 27734, Retail Alcoholic Beverage Store Operation and Management (RFP) on June 2, 1992, to procure the services of a qualified agent to operate one of three existing Department of Liquor Control (DLC) retail liquor stores. The stores are the Muddy Branch Liquor Store, the Kensington Liquor Store and the Pike Liquor Store. The corporation of which you are a stockholder and the President has filed a proposal in response to the RFP. You have indicated that the other stockholders in your corporations are not County employees and have not been involved in the liquor business.

You are a County employee and work for DLC as an assistant manager at the Quince Orchard Liquor Store. As an assistant manager, you are responsible for stocking the shelves, ordering inventory, receiving inventory, evaluating clerks, and handling cash receipts. You have had no connection with preparing the RFP, nor have you had access to any confidential information that has not otherwise been made available to vendors wishing to submit a proposal under the RFP. In this respect, Mr. Baylin has indicated that an income statement and demographic information for the three stores were made available to those interested in submitting a proposal as well as an opportunity to visit each of the three stores in question.

You have asked the Commission to allow you to keep the proposal submitted by your corporation in response to the RFP active. You have indicated that if you were awarded a contract under the RFP, you would retire from County employment.

The RFP provides for the following method of contract award: Written proposals will be evaluated utilizing criteria that include the proposer's merchandising qualifications, cash handling qualifications, inventory control qualifications, a start-up work plan, and a cash flow forecast. Interviews will be conducted for those proposers

who are ranked in the top 25% of written proposals; interviews will be evaluated using the same criteria for evaluating written proposals. All proposers who score between 85% and 100% of the total available points will be put into Group 1. Proposers who score between 75% and 84% of the total available points will be put into Group 2. The bid of each proposer in Group 1 will then be opened and reviewed. The County will enter into contract negotiations with the proposer who had bid the lowest commission rate with Group 1. If a contract is not executed with the offeror with the lowest commission rate, the County will enter into negotiations with the proposer with the next lowest commission rate in Group 1. If a contract is not issued to a proposer in Group 1, the County will begin negotiations with the proposers in Group 2 in the order of the lowest bid commission rate.

Mr. Baylin has indicated that the RFP requires any contractor who manages one of the three stores to utilize many of the same operating procedures currently being used in other DLC retail liquor stores. Mr. Baylin indicated that DLC employees represent a significant pool of potentially qualified contractors and that allowing DLC employees to submit proposals will increase competition. Mr. Baylin noted that the RFP provides that no vendor may be awarded a contract to operate more than one store. Finally, Mr. Baylin indicated that only one other proposal, in addition to the one submitted by your corporation, was submitted in response to the RFP.

By waiver dated June 3, 1992, the Commission authorized Mike M. Burdette, Administrative Services Coordinator for DLC along with two others who were not County employees to submit a proposal to the RFP.¹ The Commission noted that Section 19A-12(e) prohibits a public employee from assisting any party for contingent compensation in a matter involving a County agency except in a judicial or quasi judicial proceeding.² The Commission concluded that preparing a proposal along with others is assisting another for contingent compensation involving a County agency. Likewise, the Ethics Commission believes that your participation in submitting a proposal to the RFP on behalf of a corporation with stockholders other than yourself constitutes assisting another party for contingent compensation in a matter involving a County agency. Accordingly, so long as you remain a public employee, Section 19A-12(e) prohibits you from submitting on behalf of your corporation a response to the RFP.

Section 19A-8 authorizes the Commission to waive Section 19A-12(e) if the Commission finds that:

- “(1) The best interest of the County would be served by granting the waiver;
- (2) The importance to the County of a public employee performing his or her official duties outweighs the actual or potential harm of any conflict of interest; and
- (3) Granting the waiver will not give a public employee an unfair advantage over other members of the public.”

¹ Mr. Baylin informed the Commission that Mr. Burdette had not submitted a proposal to the RFP.

² Unless otherwise indicated, section references are to the Montgomery County Code (1984).

In applying these criteria to the circumstances of this case, the Ethics Commission finds the following factors persuasive:

1. As indicated by the Director of DLC, the County's best interest would be served by increasing the pool of qualified competitors for the RFP.
2. You have not been involved in drafting the RFP or in establishing the evaluation criteria for awarding a contract under the RFP. Accordingly, the benefit to the County of allowing you to compete for the contract outweighs any potential conflict of interest.
3. The RFP provided potential competitors with relevant financial information concerning the three stores, and the County allowed each competitor to visit each store. Furthermore, a critical step in selecting a contractor under the RFP uses the lowest commission rate bid by an offeror. This criterion, unlike the other criteria, is objective and non-judgmental. Accordingly, the Commission finds that granting you a waiver to submit a proposal will not provide you with an unfair advantage over other members of the public.

Accordingly, the Commission grants you a waiver to keep the proposal you filed in response to the RFP active. This waiver is subject to the following conditions:

1. You may not, as a public employee, participate in the evaluation of any proposals submitted under the RFP.
2. While a public employee, you may not enter into any negotiations or contract with Montgomery County.
3. This waiver only applies to RFP No. 27734 issued on June 2, 1992.

If you have any questions regarding this waiver, please contact the Ethics Commission.